



Office of the
Saskatchewan Information
and Privacy Commissioner

REVIEW REPORT 322-2021, 030-2022

Ministry of Health

June 9, 2022

Summary:

The Ministry of Health (Health) received an access to information request under *The Freedom of Information and Protection of Privacy Act* (FOIP) from the Applicant. Health issued a fee estimate then extended the timeline for responding to the request. Health did not respond to the request within that timeline. The Applicant made a request for review by the Commissioner. Health subsequently issued a response denying access to portions of records pursuant to sections 17(1)(a), (b)(i) and 29(1) of FOIP. The Applicant made another request for a review by the Commissioner. The Commissioner found that Health did not comply with section 12(3) of FOIP. The Commissioner also found that Health did not appropriately apply section 29(1) of FOIP in all circumstances, but it appropriately withheld information pursuant to sections 17(1)(a) and (b)(i) of FOIP. The Commissioner recommended that Health take steps to ensure it has adequate resources to process access to information requests in compliance with FOIP, release some information for which it claimed section 29(1) of FOIP and continue to withhold the remaining information.

I BACKGROUND

[1] On August 20, 2021, the Applicant made an access to information request to the Ministry of Health (Health) under *The Freedom of Information and Protection of Privacy Act* (FOIP). The Applicant sought access to all records dated between August 6 and August 19, 2021, inclusive, pertaining to positive COVID-19 cases related to the Saskatchewan Roughrider game on August 6, 2021. The request stated that it includes “all discussions, memos, briefing notes and emails about the declaration or lack thereof of a COVID-19 outbreak.”

- [2] Health responded to the request on September 9, 2021, noting that there are approximately 140 pages of responsive records and attached a fee estimate of \$240.00. It requested payment of 50% of the fee and stated that after payment of the deposit, it would continue to process the request. The Applicant paid the deposit on September 15, 2021.
- [3] On September 15, 2021, Health wrote to the Applicant advising that, pursuant to section 12 of FOIP, it was extending the time for its response to October 15, 2021.
- [4] On November 30, 2021, the Applicant filed a request for a review with this office, disputing Health's claim to a time extension and noting that Health had not responded to their request within the time required by FOIP. My office opened file 322-2021.
- [5] On January 10, 2022, Health issued a response pursuant to section 7 of FOIP stating that there were 47 pages of responsive records, not 140 pages as previously estimated. Health also stated that it was withholding portions of the records pursuant to sections 17(1)(a), (b)(i) and 29(1) of FOIP.
- [6] On February 7, 2022, the Applicant filed a request for a review of the January 10, 2022 response disputing Health's fee estimate and the claim that portions of the records were exempt. My office opened file 030-2022. This Report deals with the issues raised in both files 322-2021 and 030-2022.
- [7] On February 11, 2022, Health issued a refund of the deposit paid by the Applicant.
- [8] On February 14, 2022, my office notified both parties of my intent to undertake a review of Health's timeline for responding to the request, extension of the timeline, fee estimate and decision to withhold portions of records pursuant to sections 17(1)(a), (b)(i), and 29(1) of FOIP.
- [9] Health provided my office with its submission on April 14, 2022. The Applicant did not file a submission.

[10] A copy of the index of records and Health’s submission was provided to the Applicant on May 16, 2022. Subsequently, the Applicant stated that they are withdrawing their request that the fee estimate be reviewed.

II RECORDS AT ISSUE

[11] Health identified 47 pages of responsive records. It granted access in full to 32 pages and withheld portions of 15 pages of records. The records at issue and the exemptions are described in the following table:

Page No(s).	Description	Exemption(s) Applied	Withheld In Full or In Part
2, 3, 5, 6, 8, 9, 13, 23, 46	Email	Section 29(1) of FOIP	In Part
35, 37, 38, 42	Email	Sections 17(1)(a), (b)(i) of FOIP	In Part
36	Email	Section 17(1)(a) of FOIP	In Part
39	Email	Section 17(1)(b)(i) of FOIP	In Part

III DISCUSSION OF THE ISSUES

1. Do I have jurisdiction?

[12] Health is a “government institution” pursuant to section 2(1)(d)(i) of FOIP. Therefore, I have jurisdiction to conduct this review.

2. Did Health comply with section 12 of FOIP?

[13] Section 7(2) of FOIP provides that government institutions must respond to an access to information request within 30 days of receiving it unless the deadline for the response was extended pursuant to section 12 of FOIP. Section 7(2) of FOIP states, in part:

7(2) The head shall give written notice to the applicant within 30 days after the application is made:

[14] Section 12 of FOIP sets out the circumstances where a government institution can extend the initial 30-day deadline for a maximum of 30 days. If the deadline is extended for the maximum amount, the government institution has 60 days in total to respond.

[15] Health's notice of the extension stated it was relying on sections 12(1)(a)(ii), (b) and (c) of FOIP. However, in its submission it clarified that it was only relying on sections 12(1)(b) and (c) of FOIP.

[16] Sections 12(1)(b) and (c) of FOIP provide as follows:

12(1) The head of a government institution may extend the period set out in section 7 or 11 for a reasonable period not exceeding 30 days:

...

(b) where consultations that are necessary to comply with the application cannot reasonably be completed within the original period; or

(c) where a third party notice is required to be given pursuant to subsection 34(1).

[17] Section 12(2) of FOIP requires a head to give notice of the extension within 30 days after the access to information request is made. Section 12(2) of FOIP provides:

12(2) A head who extends a period pursuant to subsection (1) shall give notice of the extension to the applicant within 30 days after the application is made.

[18] Section 12(3) of FOIP states that once the timeline for responding to an access to information request has been extended, the government institution must respond to it within the period of the extension. Section 12(3) of FOIP provides:

12(3) Within the period of extension, the head shall give written notice to the applicant in accordance with section 7.

[19] In this case, Health extended the timeline for responding to the access to information request to October 15, 2021, and therefore, it was required to respond by that date. However, Health did not respond until January 10, 2022. As Health did not respond to the

Applicant's access to information request by October 15, 2021, regardless of whether it had appropriately extended the time for its response, I find that Health did not comply with section 12(3) of FOIP. In these circumstances, it is not necessary for me to decide whether Health complied with sections 12(1) and (2) of FOIP.

[20] Health acknowledged that it did not respond within the legislated timeline. It explained that many factors contributed to the delay and noted that Health has and continues to take steps to alleviate some of the challenges faced while processing access to information requests. For example, it has hired a second Senior Policy Analyst and is evaluating its processes to ensure access to information requests are being responded to in a timely manner.

[21] I find it concerning that, over the past several years, my office has continually needed to remind Health of its statutory obligation to meet legislated timelines. My office has done so, for example, in the following Review Reports: [Review Report 303-2021](#), [Review Report 082-2019](#), [083-2019](#), [Review Report 036-2018](#), [Review Report 209-2015 to 213-2015](#), [Review Report 063-2015 to 077-2015](#), [Review Report 115/2014](#), and [Review Report 090-2014](#).

[22] Even after hiring an additional Senior Policy Analyst and "taking steps to alleviate some of the challenges faced while processing access to information requests," Health continues to fail to comply with legislated timelines. I recommend that Health take its history of late responses more seriously, complete a review and report on its processes and staffing resources to my office within 90 days of this Report.

3. Did Health properly apply section 17(1)(a) of FOIP to the records?

[23] Health applied section 17(1)(a) of FOIP to information withheld on pages 35, 36, 37, 38, and 42. Section 17(1)(a) of FOIP is a discretionary exemption. It permits refusal of access in situations where release of a record could reasonably be expected to disclose advice, proposals, recommendations, analyses or policy options developed by or for a government institution or a member of the Executive Council. It provides:

17(1) Subject to subsection (2), a head may refuse to give access to a record that could reasonably be expected to disclose:

(a) advice, proposals, recommendations, analyses or policy options developed by or for a government institution or a member of the Executive Council;

[24] My office uses the following two-part test to determine if section 17(1)(a) of FOIP applies:

1. Does the information qualify as advice, proposals, recommendations, analyses or policy options?
2. Was the advice, proposals, recommendations, analyses and/or policy options developed by or for a government institution or a member of the Executive Council?

(*Guide to FOIP*, Chapter 4: “Exemptions from the Right of Access”, Updated: April 30, 2021, at pp. 123 - 130 (*Guide to FOIP*, Ch. 4))

[25] In its submission, Health asserted:

Page 35, outlines a conversation Ministry employees are engaged in as part of their duties and responsibility to provide analysis. The discussion relates to the presentation, contents and definitions that can be found on a specific web page that is active on the government of Saskatchewan website. ... The applicability of this exemption rests on the content of communication that capture advice being shared in the course of deliberations; evidently the guidance found on these pages is offered from one person to another, in order to reach a decision for a specific action to be taken.

As the email thread progresses onto pages 36 to 38, there are several captured recommendations put forward for a specific direction.

[26] As Health claimed that the withheld information is advice and recommendations, the following definitions from my office’s *Guide to FOIP* are relevant here:

Advice is guidance offered by one person to another. It can include the analysis of a situation or issue that may require action and the presentation of options for future action, but not the presentation of facts. Advice encompasses material that permits the drawing of inferences with respect to a suggested course of action, but which does not itself make a specific recommendation. It can be an implied recommendation. The “pros and cons” of various options also qualify as advice. It should not be given a restricted meaning. Rather, it should be interpreted to include an option that involves exercising judgement and skill in weighing the significance of fact. It includes expert opinion on matters of fact on which a government institution must make a decision for future action.

Advice includes the views or opinions of a public servant as to the range of the policy options to be considered by the decision maker even if they do not include a specific recommendation on which option to take.

...

A **recommendation** is a specific piece of advice about what to do, especially when given officially; it is a suggestion that someone should choose a particular thing or person that one thinks particularly good or meritorious. Recommendations relate to a suggested course of action more explicitly and pointedly than “advice.” It can include material that relates to a suggested course of action that will ultimately be accepted or rejected by the person being advised. It includes suggestions for a course of action as well as the rationale or substance for a suggested course of action. A recommendation, whether express or inferable, is still a recommendation.

(Guide to FOIP, Ch. 4, at pp. 124-125)

[27] I find that the information withheld pursuant to section 17(1)(a) of FOIP qualifies as advice because the information includes general guidance about a communication strategy following a large gathering of people. Other withheld information qualifies as recommendations because it is specific advice about how to manage the communications. Therefore, I find that the first part of the test has been met. The advice and recommendations were developed by Health’s staff for other senior staff within the ministry. Therefore, I find that the second part of the test has been met. For these reasons, I find that Health properly applied section 17(1)(a) of FOIP.

4. Did Health properly apply section 17(1)(b)(i) of FOIP to the records?

[28] Health applied section 17(1)(b) of FOIP to pages 35, 37, 38, 39, and 42. As I have already found that the information severed from pages 35, 37, 38 and 42 is exempt pursuant to section 17(1)(a) of FOIP, I need only consider whether the information severed from page 39 is exempt pursuant to section 17(1)(b)(i) of FOIP.

[29] Section 17(1)(b)(i) of FOIP permits refusal of access in situations where release of a record could reasonably be expected to disclose consultations or deliberations involving officers or employees of a government institution.

[30] The provision is intended to allow persons with decision-making responsibility to freely discuss the issues before them to arrive at well-reasoned decisions. The intent is to allow such persons to address an issue without fear of being wrong, looking bad, or appearing foolish if their frank deliberations were to be made public. However, the provision is not meant to protect the bare recitation of facts, without anything further.

[31] Section 17(1)(b)(i) of FOIP provides as follows:

17(1) Subject to subsection (2), a head may refuse to give access to a record that could reasonably be expected to disclose:

...

(b) consultations or deliberations involving:

(i) officers or employees of a government institution;

[32] My office uses the following two-part test when deciding whether section 17(1)(b)(i) of FOIP applies:

1. Does the record contain consultations or deliberations?
2. Do the consultations or deliberations involve officers or employees of a government institution, a member of the Executive Council, or the staff of a member of the Executive Council?

(*Guide to FOIP*, Ch. 4, pp. 132-133)

[33] The definition of “deliberation” set out in my office’s *Guide to FOIP* is relevant here.

Deliberation means:

- the action of deliberating (to deliberate: to weigh in mind; to consider carefully with a view to a decision; to think over); careful consideration with a view to a decision;
- the consideration and discussions of the reasons for and against a measure by a number of councillors.

(*Guide to FOIP*, Ch. 4, p. 132)

[34] In its submission, Health asserted:

These pages were email correspondence between Ministry and SHA employees that included deliberations on a decision item that needed to be made regarding updates on an active website page. ... Both Ministry and SHA employees expressed their views and engaged in deliberation with the sole purpose of making a decision.

To satisfy the second portion of the IPC's test, consultations must include officers or employees of a government institution. As previously outlined, these conversations included several Ministry employees who are tasked with providing subject matter input as well as have decision making capacity on issues such as this. Government employees within the identified areas of communications, epidemiology, and leadership are all a part of the conversation; their advice, opinions are both sought and expected in order to arrive at a decision thereby allowing action to be the end result of these deliberations. The Ministry respectfully submits the tests set out for application of 17(1)(b)(i) have been met.

[35] I find that the withheld information on page 39 qualifies as a deliberation. While the text does not use language such as "for and against," the author of the email sets out their advice on the communications strategy, and statements or concerns about related matters that might impact the communications strategy. I also find that the deliberations involved officers or employees of a government institution. Therefore, I find that both parts of the test for the application of section 17(1)(b)(i) of FOIP have been met in relation to the information withheld from page 39.

5. Did Health properly apply section 29(1) of FOIP to the records?

[36] Health withheld names and email addresses of various individuals from pages 2, 3, 5, 6, 8, 9, 13, 23, and 46 pursuant to section 29(1) of FOIP. On page 46, Health also withheld an individual's name, their business title, and the name of their employer.

[37] Section 29(1) of FOIP is a mandatory exemption that protects the privacy of individuals whose personal information may be contained in records that are responsive to a request made by someone else. Section 29(1) of FOIP requires a government institution to have the consent of the individual whose personal information is in the record prior to disclosing it (*Guide to FOIP*, Ch. 4 at p. 281).

[38] Section 29(1) of FOIP provides:

29(1) No government institution shall disclose personal information in its possession or under its control without the consent, given in the prescribed manner, of the individual to whom the information relates except in accordance with this section or section 30.

[39] In order for section 29(1) of FOIP to apply, the withheld information must qualify as third party “personal information” as defined in section 24(1) of FOIP.

[40] Section 24(1) of FOIP also provides some examples of the types of information that can be considered personal information. To qualify as personal information, the information must, 1) be about an identifiable individual, and 2) be personal in nature.

[41] The list of examples of personal information in section 24(1) of FOIP is not exhaustive. Sections 24(1)(a) and (e) of FOIP are relevant here. They provide:

24(1) Subject to subsections (1.1) and (2), “personal information” means personal information about an identifiable individual that is recorded in any form, and includes:

(a) information that relates to the race, creed, religion, colour, sex, sexual orientation, family status or marital status, disability, age, nationality, ancestry or place of origin of the individual;

...

(e) the home or business address, home or business telephone number, fingerprints or blood type of the individual;

[42] Health asserted that section 29(1) of FOIP was applied to the names and email addresses of the identifiable personal information of non-government employees.

[43] With one exception on page 6 that I will address below, the information severed from the records pursuant to section 29(1) of FOIP includes names, business emails, and job or position titles of individuals.

[44] This is the type of information that one normally sees on a business card, business letter and business email correspondence, which does not relate to individuals in their personal

capacity. It relates to individuals in their professional or business capacity and, therefore, it is not personal in nature. This approach to business card information is consistent with previous reports issued by my office. See, for example my office's Review Reports [301-2019](#) and [117-2018](#).

[45] While the withheld information is about identifiable individuals, it does not qualify as personal information as defined in section 24(1) of FOIP because the information is not personal in nature. Therefore, I find that this information is not exempt pursuant to section 29(1) of FOIP.

[46] The one exception to my finding is the information severed from page 2 (and duplicated on page 6). The withheld information is about an identifiable individual and while it appears in a business email, it is used in a statement about the individual's family status and is of a personal nature. Therefore, I find that the name of the individual that appears on page 2 (and duplicated on page 6) qualifies as personal information under section 24(1) of FOIP and it is exempt pursuant to section 29(1) of FOIP.

V FINDINGS

[47] I find that Health did not comply with section 12(3) of FOIP because it did not respond to the access to information request within the time extended deadline.

[48] I find that Health properly applied section 17(1)(a) of FOIP.

[49] I find that Health properly applied section 17(1)(b)(i) of FOIP.

[50] I find that Health properly applied section 29(1) of FOIP to page 2 (and its duplicate on page 6).

[51] I find that Health did not properly apply section 29(1) of FOIP to pages 3, 5, 8, 9, 13, 23, and 46.

V RECOMMENDATIONS

- [52] I recommend that Health complete a review of its processes and staffing resources and prepare a report for my office on the results of its review within 90 days of this Report.
- [53] I recommend that Health continue to withhold the information exempt pursuant to sections 17(1)(a) and (b)(i) of FOIP.
- [54] I recommend that Health continue to withhold the information exempt pursuant to section 29(1) of FOIP on page 2, and the duplicate on page 6.
- [55] I recommend that Health release the information withheld pursuant to section 29(1) of FOIP on pages 3, 5, 8, 9, 13, 23, and 46.

Dated at Regina, in the Province of Saskatchewan, this 9th day of June, 2022.

Ronald J. Kruzeniski, Q.C.
Saskatchewan Information and Privacy
Commissioner